HSBC BANK MALAYSIA BHD

v.

TIRATHRAI SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: S3-24-793-2002]
24 SEPTEMBER 2008

CIVIL PROCEDURE: *Committal proceedings - Application for - Order for sale of property of first respondent - Whether actions and conduct of second to fifth respondents impeded carrying out of order for sale - Interference with administration of justice - Abuse of process of court - Special aggravating element - Whether custodial sentence warranted - Rules of the High Court 1980, O. 52 r. 3*

This was a motion under O. 52 r. 3 of the Rules of the High Court 1980 for an order of committal to be issued against the second to fifth respondents, the directors of the first respondent company. This motion was based on the alleged actions and conduct of the second to fifth respondents which had caused a series of events to occur that resulted in impeding, on several occasions, the carrying out of an order for sale issued by this court against the first respondent on 20 March 2003 ('order for sale'). The plaintiff bank (the applicant in this committal proceeding) was a chargee that had obtained the order for sale against the property of first respondent, namely, the well known Globe Silk Store building at Jalan Tuanku Abdul Rahman, Kuala Lumpur ('property'). As at 26 January 2005, when this motion was filed, three auction dates on the property had been fixed by the court, but none were able to be carried out on the scheduled dates. Between the issuance of the order for sale and the commencement of the present committal proceeding, the first respondent had caused four caveats to be lodged on the property; had attempted to obtain an injunction against the plaintiff; and had obtained two *ex parte* restraining orders against the plaintiff under s. 176 of the Companies Act 1967. These caveats, the injunction application and the restraining orders were all applied for just within four days before the auction dates, resulting in the auctions having had to be aborted. What required consideration

was whether the actions and conduct of the second to fifth respondents obstructed the course of, and interfered with, the administration of justice, and were acts constituting contempt of court.

Held (allowing the motion):

(1) Based on the facts and also the inferences of facts that could reasonably be drawn from the basic facts, this case had much more to do with subtle illegal actions rather than just merely about auctions being adjourned. The conduct of the second to fifth respondents as a whole amounted to an open defiance and a frontal attack on the authority of the court and the administration of justice. Their actions were deliberate and intentionally designed to frustrate the order for sale. Interference with the administration of justice covers any act that impedes the ability of the courts to deliver justice. Likewise, obstructing the course of justice covers any act that is obstructive to the course of justice. As at 26 January 2005, the order for sale had yet to be given effect to. As at that date three scheduled public auctions had not been able to be carried out, and there was a caveat in the way of the scheduled fourth auction. The respondents had stultified the foreclosure proceeding without the first respondent having to repay its indebtedness. Abuse of process is punishable with contempt of court. The respondents' conduct in this case was far worse than a mere disobedience of an order. There existed here a concerted and premeditated plan, and a sustained and manipulative effort to set the order for sale to naught. The fact pattern revealed a startling abuse of the court process, which scandalised the court and which must be purged and sanctioned. (paras 10, 83, 85 & 86)

(1a) Obedience to an order of the court is the very foundation of this country's judicial and legal system. If any member of the public is 'at liberty' to disobey a court's order, then the judicial and legal system will collapse; and so will law and order. But the present case had a special aggravating element and that was the manner the act of disobedience was done by the respondents. It had an element of subtlety

and cunningness. By engaging lawyers and other professionals and invoking the legal process, the acts had an outward appearance of professionalism, sophistication and legality. Such a *modus operandi* often makes the victim and, indeed, the judicial and legal system itself, helpless. Because of the subtle method employed and the ruthless utilisation of the court process, it is often an uphill task for the aggrieved party to convince a court of law that, behind the facade of 'legality' employed by his adversary, he is in fact being victimised or being mercilessly and unjustly deprived the fruits of his litigation; unless the victim is a person of means (like the plaintiff in the present case, being a bank with financial resources at its disposal) and able to employ an able prosecutor. Bearing the above in mind (and having taken into account the plea in mitigation), a custodial sentence was warranted. (paras 87 & 88)

[Second to fifth respondents found guilty of contempt and each sentenced to three months' imprisonment.]

Case(s) referred to:

Affin Bank Berhad v. Tan Sri Kishu Tirathrai (No 2) [2004] 7 CLJ 145 HC ***(refd)***

Datuk Hong Kim Sui v. Tiu Shi Kian & Anor [1987] 1 CLJ 438; [1987] CLJ (Rep) 1 ***(refd)***

Datuk Hong Kim Sui v. Tiu Shi Kian & Anor & Another Case [1985] 1 CLJ 39; [1985] CLJ (Rep) 101 FC ***(refd)***

Jasa Keramat Sdn Bhd v. Monatech Sdn Bhd [2001] 4 CLJ 549 CA ***(refd)***

William Jacks & Co (M) Sdn Bhd v. Chemquip (M) Sdn Bhd & Anor [1994] 3 CLJ 125 HC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 141(8), 176(10)

Rules of the High Court 1980, O. 52 rr. 2, 3

For the plaintiff/applicant - Benjamin Dawson (ST Goh with him); M/s Benjamin Dawson

For the respondents - YM Raja Aziz Addruse (T Gunaseelan with him); M/s Gunaseelan & Assoc

Reported by Suresh Nathan

JUDGMENT

Hishamudin Mohd Yunus J:

[1] On 17 January 2005 this court granted leave to the plaintiff pursuant to O. 52 r. 2 of the Rules of the High Court 1980 ('the RHC') to commence committal proceeding against the defendant/first respondent (Tirathrai Sdn Bhd or 'TSB') and its directors, namely:

(1) Tan Sri Kishu Tirathrai ('the second respondent');

(2) Puan Sri Mona Kishu Tirathrai ('the third respondent');

(3) Vinod Kishu Tirathrai ('the fourth respondent'); and

(4) Bushan Kishu Tirathrai ('the fifth respondent');

(hereinafter collectively referred to as 'the respondents').

[2] This (encl. 69) is a motion under O. 52 r. 3 of the RHC for an order of committal to be issued against the second to fifth respondents (that is to say, the four persons named above). The first respondent was wound up on 11 May 2005. The plaintiff is now not proceeding against the first respondent.

[3] On 12 July 2007, that is, the day of the decision, I delivered a brief judgment. I found the second to the fifth respondents guilty of contempt. I had sentenced each of them to three months' imprisonment. I had indicated to parties that I would deliver a full written judgment in due course. The following is my full written judgment.

[4] This motion is based on the actions and conduct of the second to fifth respondents which have obstructed the course of, and interfered with, the administration of justice. Their actions and conduct have caused a series of events to occur that resulted in impeding, on several occasions, the carrying out of an order for sale issued by this court against the first respondent on 20 March 2003 ('the order for sale'). The sole object and common design on the part of the second to fifth respondents seen in all these series of events is to subvert and to undermine the order for sale in a manner that scandalizes the court's process.

[5] The essential facts are hardly disputed. But the inferences and findings that I make in this judgment are. The plaintiff bank (the applicant in this committal proceeding) is a chargee who has obtained an order for sale on 20 March 2003 against the property of the defendant/first respondent, namely, the well known Globe Silk Store building at Jalan Tuanku Abdul Rahman, Kuala Lumpur ('the property').

[6] The defendant/first respondent (Tirathrai Sdn Bhd/TSB) is a family company. The second (Tan Sri Kishu) and third respondents (Puan Sri Mona Kishu) are the ultimate shareholders of the first respondent. This is because they are the only shareholders of Tirathrai Holdings Sdn Bhd ('THSB'); and THSB is the sole shareholder of the defendant/first respondent. The third respondent is the wife of the second respondent. The fourth and fifth respondents are the children of the second and third respondents.

[7] As at 26 January 2005, when encl. 69 was filed, three auction dates on the property had been fixed by the court. But none of the auctions was able to be carried out on the scheduled dates. The enforcement of the order for sale had been frustrated by the conduct of the second to the fifth respondents.

[8] Between the issuance of the order for sale and the commencement of the present committal proceeding, the defendant/first respondent had caused four caveats to be lodged on the property; had attempted to obtain an injunction against the plaintiff; and had obtained two *ex parte* restraining orders against the plaintiff under s. 176 of the Companies Act 1965 ('the Companies Act').

[9] These caveats, the injunction application and the restraining orders were all applied for just within days before the auction dates, resulting in the auctions having had to be aborted. At the hearing of the plaintiff's applications to remove the caveats, all the caveators were represented by the same counsel, namely, a Mr. Govin Sreedharan, from the legal firm of Messrs Choong & Co. This legal firm was also the defendant's/first respondent's solicitors in the first restraining order application which I will deal with in due course.

[10] In my judgment, based on the facts, and also on the inferences of facts that could reasonably be drawn from the basic facts, this case has much more to do with subtle illegal actions rather than just merely about auctions being adjourned. It is my finding that the conduct of the second to the fifth respondents as a whole amount to an open defiance and a frontal attack on the authority of the court and the administration of justice. Their actions are deliberate and intentionally designed to frustrate the order for sale that the court had made.

[11] Interference with the administration of justice and obstructing the course of justice are acts constituting contempt of Court (see *Jasa Keramat Sdn Bhd v. Monatech Sdn Bhd* [2001] 4 CLJ 549). The approach to be taken in determining whether or not there is interference with the administration of justice is to look at the facts of the case as a whole. In this case cited, Abdul Hamid Mohamad JCA (as he then was) said (at p. 556):

> We are of the view that the issues and the facts should not have been compartmentalized as the learned Judge did. The court should look at all the facts as a whole and see whether there was an interference with the due administration of justice or the course of justice. That is what this contempt is all about.

[12] The facts and the sequence of events that I shall now narrate will show the steps taken by the defendant/first respondent, via the second to the fifth respondents, to undermine the order for sale.

Caveats By Misru Sdn Bhd, Headstart Industries Sdn Bhd And Tirathrai Management Services Sdn Bhd

[13] I shall begin by referring to the relationship between the defendant/first respondent and the caveators. The caveators are the following companies:

(1) Misru Sdn Bhd ('MSB');

(2) Headstart Industries Sdn Bhd ('HISB'); and

(3) Tirathrai Management Services Sdn Bhd ('TMSSB').

[14] The caveators are all directly or indirectly owned and controlled by the second and third respondents, the ultimate shareholders of the first respondent. The caveators are the alter ego of the defendant/first respondent.

[15] It is my finding that the transactions leading to the caveats are nothing but sham transactions. The caveats were entered by placing reliance on three purported letters for tenancy agreement with an option to purchase the demised premise (ie, the property). The letters were purportedly dated 19 July 2001, 25 March 2002 and 24 September 2002 respectively.

[16] The first letter for tenancy agreement reads:

July 19, 2001

Headstart Industries Sdn Bhd
Unit No. 203, 2nd Floor
Block C, Damansara Intan
No. 1, Jalan SS 20/27
47400 Petaling Jaya
Selangor Darul Ehsan

Dear Sirs,

We write to confirm that we have agreed to let and you have agreed to rent the premises detailed below on the following terms and conditions:

1. Entire 6th floor of the building bearing postal address No. 185, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur ("the demised premises");

2. Rental at the rate of RM10,500/- per month which shall include all the fittings and furniture contained therein;

3. The tenancy shall commence on 01/9/2001;

4. The duration of the tenancy shall be for a period of three (3) years with an option to extend the same for further periods of three (3) years each (subject to a maximum of 10 extensions) at a monthly rental at the prevailing market rate to be determined by an independent valuer jointly appointed by us provided always that any increase in rental shall not exceed 20% of the rental for the previous term; and

5. You shall have the option to purchase the demised premises after the strata title has been issued thereto at a purchase price based on the prevailing market rate to be determined by an independent valuer jointly appointed by us. Prior to the aforesaid option being exercised, you shall be entitled to lodge a private caveat over the land on which the building bearing postal address No. 185, Jalan Tuanku Abdul Rahman 50100 Kuala Lumpur is erected.

This letter shall be binding upon both our respective successors in title and permitted assigns.

Thank you.

Yours faithfully,
Globe Silk Store
(Tirathrai Sdn Bhd)

Sgd
Tan Sri Kishu Tirathrai
Chairman & Managing Director

We, Headstart Industries Sdn Bhd hereby confirm our agreement to the terms and conditions herein.

Yours faithfully,

Sgd
Chong Fook Sin
Director

[17] The second letter for tenancy agreement reads:

March 25, 2002

Tirathrai Management Services Sdn Bhd
Unit No. 203, 2nd Floor
Block C, Damansara Intan
No. 1, Jalan SS 20/27
47400 Petaling Jaya
Selangor Darul Ehsan

Dear Sirs,

We write to confirm that we have agreed to let and you have agreed to rent the premises detailed below on the following terms and conditions:

1. Entire 9th floor of the building bearing postal address No. 185, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur ("the demised premises");

2. Rental at the rate of RM6,000/- per month which shall include all the fittings and furniture contained therein;

3. The tenancy shall commence on 01/5/2002;

4. The duration of the tenancy shall be for a period of three (3) years with an option to extend the same for further periods of three (3) years each (subject to a maximum of 10 extensions) at a monthly rental at the prevailing market rate to be determined by an independent valuer jointly appointed by us provided always that any increase in rental shall not exceed 20% of the rental for the previous term; and

5. You shall have the option to purchase the demised premises after the strata title has been issued thereto at a purchase price based on the prevailing market rate to be determined by an independent valuer jointly appointed by us. Prior to the aforesaid option being exercised, you shall be entitled to lodge a private caveat over the land on which the building bearing postal address No. 185, Jalan Tuanku Abdul Rahman 50100 Kuala Lumpur is erected.

This letter shall be binding upon both our respective successors in title and permitted assigns.

Thank you.

Yours faithfully,
Globe Silk Store
(Tirathrai Sdn Bhd)

Sgd
Tan Sri Kishu Tirathrai
Chairman & Managing Director

We, Tirathrai Management Services Sdn Bhd hereby confirm our agreement to the terms and conditions herein.

Yours faithfully,

Sgd
Puan Sri Mona Kishu Tirathrai
Director

[18] The third letter for tenancy agreement reads:

September 24, 2002

Misru Sdn Bhd
Unit No. 203, 2nd Floor
Block C, Damansara Intan
No. 1, Jalan SS 20/27
47400 Petaling Jaya
Selangor Darul Ehsan

Dear Sirs,

We write to confirm that we have agreed to let and you have agreed to rent the premises detailed below on the following terms and conditions:

1. Entire 10th floor of the building bearing postal address No. 185, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur ("the demised premises");

3. Rental at the rate of RM5,000 per month which shall include all the fittings and furniture contained therein;

3. The tenancy shall commence on 01/11/2002;

4. The duration of the tenancy shall be for a period of three (3) years with an option to extend the same for further periods of three (3) years each (subject to a maximum of 10 extensions) at a monthly rental at the prevailing market rate to be determined by an independent valuer jointly appointed by us provided always that any increase in rental shall not exceed 20% of the rental for the previous term; and

5. You shall have the option to purchase the demised premises after the strata title has been issued thereto at a purchase price based on the prevailing market rate to be determined by an independent valuer jointly appointed by us. Prior to the aforesaid option being exercised, you shall be entitled to lodge a private caveat over the land on which the building bearing postal address No. 185, Jalan Tuanku Abdul Rahman 50100 Kuala Lumpur is erected.

This letter shall be binding upon both our respective successors in title and permitted assigns.

Thank you.

Yours faithfully,
Globe Silk Store
(Tirathrai Sdn Bhd)

Sgd
Tan Sri Kishu Tirathrai
Chairman & Managing Director

We, Misru Sdn Bhd hereby confirm our agreement to the terms and conditions herein.

Yours faithfully,

Sgd
Vijay Kishu Tirathrai
Director

[19] The facts in relation to HISB neatly exemplifies that these transactions were sham transactions. As I have pointed out, the letter for the tenancy agreement is purportedly dated 19 July 2001. HISB's current asset is only RM114. Its total assets are negative RM14,710. Its nature of business is dormant. It is a mere RM2 company. Its turnover is nil. Yet it purports to enter into a tenancy agreement at RM10,500 per month with the first respondent.

[20] It is important to observe that the letters granting the purported tenancy agreements were all executed by the same person, that is, Tan Sri Kishu Tirathrai (the second respondent). In respect of the caveat entered by TMSSB, both the application to lodge the caveat and the statutory declaration were signed by Puan Sri Mona Kishu Tirathrai (the third respondent), as director of TMSSB. In respect of the caveat entered by MSB, the application was also signed by Puan Sri Mona Kishu Tirathrai, whilst the statutory declaration was affirmed by her son, Vijay Kishu Tirathrai (the fourth respondent). In respect of the caveat entered by HISB, both the application and the caveat were signed by one Chong Fook Sin. As will be pointed out in due course, Chong Fook Sin is no stranger to the Tirathrai family. He is the common company secretary for THSB, the first respondent (TSB), MSB, HISB and TMSSB. He is also a shareholder and director of HISB.

[21] Upon examining the records obtained from the Companies Commission Malaysia ('CCM') pertaining to the companies, one notes the following facts. MSB is only a RM2 company. MSB's turnover is nil and its business activity appears to be dormant. Yet

the purported rental in respect of the 10th floor of the Globe Silk Store's building (as stated in the letter granting the tenancy) is RM5,000 a month. It is inconceivable that MSB could pay the monthly rental of RM5,000. Both MSB and the first respondent have common directors and shareholders, they being the second, third, fourth and fifth respondents. The second and third respondents are the ultimate shareholders of the first respondent, they being the only two shareholders of Tirathrai Holdings Sdn Bhd (THSB); and THSB, as we have noted, is the only shareholder of the first respondent. MSB and the first respondent have the same company secretaries: Chong Fook Sin and Ng Kam May. It is also important to note that the purported tenancy agreement is unstamped. And there is no consideration for the giving of the option to purchase.

[22] Now, turning to HISB, it is also a RM2 company. The nature of its business is stated as dormant. HISB does not carry on any business and its turnover is nil. Yet the purported rental in respect of the 6th floor of the property payable to the first respondent, as stated in the letter granting the tenancy, is RM10,500 per month. It is inconceivable that HISB could pay the monthly rental of RM10,500. Its director and shareholder, Chong Fook Sin, is the company secretary for the first respondent. Likewise here, the purported tenancy agreement is unstamped. And, likewise here, there is no consideration for the giving of the option to purchase.

[23] As for TMSSB, its turnover is nil. Yet the purported rental in respect of the 9th floor of the property payable to the first respondent, as stipulated in the letter granting the tenancy, is RM6,000 per month. It is inconceivable that TMSSB could pay the monthly rental of RM6,000. TMSSB and the first respondent have common directors and shareholders (that is to say the second, third, fourth and fifth respondents). The registered address of TMSSB and the registered address of the holding company of the first respondent, Tirathrai Holdings Berhad, is the same (that is to say, unit 203 Tingkat 2, Blok C Damansara Intan, 1 Jln SS20/27 Petaling Jaya). The purported tenancy agreement is unstamped. There is no consideration for the giving of the option to purchase.

[24] The plaintiff has averred that the purported tenancy agreements are incapable of being performed by the caveators as the latter are either a RM2 company or a company who lacks the means to do so. This assertion by the plaintiff is not rebutted or denied by the respondents.

[25] The execution of the letters for the tenancy agreement with an option to purchase by the first respondent is a breach of the terms of the charges. Consent of the plaintiff is required in order to let out any floor of the property or to grant an option to purchase to any person. However, here, no such consent was ever obtained. Under the charges the first respondent has also covenanted not to encumber the property. However, under the letters for the tenancy agreement the first respondent has expressly allowed the caveators to lodge caveats.

[26] The timing of the lodging of the caveats is highly significant in evaluating the conduct of the parties involved. All the three caveats were lodged on the same day, that is to say, 18 December 2003; and this is some eight days before the second auction date (26 December 2003). But notice of the caveats was given by the caveators' solicitors to the plaintiff's solicitors only on 24 December 2003, that is to say, just two days before the second auction date. Hence the plaintiff had no opportunity to remove the caveats due to the time constraint.

[27] Who were the lawyers involved with the caveats? This is also a pertinent factor to consider. The solicitors on record for the caveators were Messrs Ravi, Beltran & Co. However, counsel appearing in all the three originating summons to resist the removal of the caveats was one Mr. G. Sreedharan. Now, Mr. Sreedharan (together with one Ms Ayenita Sood) was also the counsel for the defendant/first respondent when the latter applied for and obtained the first restraining order against the plaintiff. To repeat what has been said earlier, Mr. Sreedharan is from the legal firm of Messrs Choong & Co. There is also clear evidence that Messrs Ravi, Beltran & Co was taking instructions from Messrs Choong & Co in proceedings pertaining to the caveats. And Messrs Choong & Co was the solicitors for the first respondent in the first restraining order proceeding. All these links in terms of legal representations make it plain that the real actor behind the scene is the first respondent, whose directors are the second to the fifth respondents.

[28] It is my finding that based on the above facts the real object of the so-called 'tenancy agreements' and the caveats was to frustrate the second auction. The respondents knew that the existence of the caveats would discourage any right thinking would-be bidder from considering bidding for the property.

[29] I accept the plaintiff's contention that the second to fifth respondents' explanation that the purpose of the caveat was to give notice to any interested would-be bidder that the purchase of the property is subject to the caveators' interest but that they (the caveators) were willing to consent to the registration of a certificate of sale, is mischievous, *mala fide* and a contradictory in terms.

[30] The second to fifth respondents have also not offered any explanation as to why the first respondent had created interests in the property contrary to the terms of the charges, that is to say, without the consent of the plaintiff. By creating interests in the property, the second to fifth respondents, *via* the first respondent, have deliberately acted to defeat the right of the plaintiff to have the property auctioned off in an unencumbered state.

[31] The second to fifth respondents' explanation that they did not seek the consent from the plaintiff because 'the caveators were all companies associated and connected to the first respondent' makes no sense at all and is utterly incomprehensible.

[32] To compound matters, the first respondent who had an obligation not to create any interest in the property without the plaintiff's consent and a further obligation not to encumber the property, was opposing the removal of the caveats through its *alter ego*, the caveators, who were represented by Mr. G. Sreedharan, counsel for the first respondent in the first restraining order application. The High Court rightly ordered the caveats to be removed. The caveats by MSB and HISB were ordered to be removed on 22 June, whilst the caveat by TMSSB was ordered to be removed on 30 June 2004.

[33] It is, therefore, my finding that clearly the alleged transactions are not genuine transactions, meaning that they are mere shams. In other words, the so-called 'tenancy agreements' do not in fact exist at all. Everything about them is untrue including the dates of their alleged execution.

[34] It is further pertinent to observe from the facts that the caveators are in fact the alter ego of the first respondent. In the circumstances, it is fair and reasonable to make the further inference that in reality the purported letters for tenancy agreement were prepared and executed not on the purported dates as mentioned in the letters but in fact were prepared and executed after the order for sale was made by the court and just before the second auction date.

[35] The ultimate control of the first respondent and the caveators are in the hands of the Tirathrai family. Hence, the directors of the first respondent should not be allowed to escape responsibility for what they have done.

[36] But the entering into the so-called 'tenancy agreements' and the lodging of the caveats were not the only acts of the respondents that had an adverse consequence on the auction dates: there are other acts too. They are as follows.

The Sale And Purchase Agreement With Cheerful Vision Sdn Bhd

[37] This is by far the grossest act of the defendant/first respondent. Barely three months after the court had removed (in June 2004) the three caveats alluded to the above, and slightly over a month after the senior assistant registrar had fixed (the fixing was done on 4 August 2004) the third auction date (20 September 2004), the defendant/first respondent entered into a sale and purchase agreement with a company known as Cheerful Vision Sdn Bhd ('CVSB') on 16 September 2004.

[38] The timing of the execution of this sale and purchase agreement between first respondent and CVSB is significant. For, as just stated in the preceding paragraph, it was executed on 16 September 2004. This, it must be noted, is just four days before the third auction date (20 September 2004). It is also pertinent to note that the execution of the sale and purchase agreement was followed by the entering of a caveat on 17 September 2004, a mere three days before the day the third auction was supposed to be carried out. Clearly this is a further *mala fide* attempt by the first respondent to forestall the scheduled third auction.

[39] The facts about CVSB are telling. It is a mere RM2 company, incorporated on 14 November 2003. It has no business address. No company documents have been filed with CCM. It shares the same registered office with the companies under the Tirathrai group (the unit 203, Damansara Intan address); and it shares the same company secretaries with the first respondent (namely, Chong Fook Sin and Ng Kam Say).

[40] Another important fact to note is that, in breach of the terms of the charge (see para. 6(g) of the charge annexure), no consent of the plaintiff was ever obtained for the sale. And not only that: the first respondent further expressly consented to CVSB entering a caveat (see cl. 5.3.1 of the sale and purchase agreement) knowing fully well that the caveat would frustrate the auction and was contrary to their covenant not to encumber the property (see para. 6(g) of the charge annexure).

[41] A further revealing fact to note is that the solicitors for CVSB, namely, Messrs Tay & Helen Wong had written to the auctioneer by a letter dated 17 September 2004 bringing to the auctioneer's attention the sale of the property by the first respondent to CVSB and requesting that the scheduled auction be not proceeded with 'pending completion of the sale'. The same solicitors also wrote to the deputy registrar of the High Court and the plaintiff's solicitors requesting the deputy registrar to make known to the interested bidders of the fact of the caveat being lodged. These measures were calculated to repel any would-be bidders at the scheduled third auction.

[42] Under the so-called sale and purchase transaction, the purchase consideration was RM32 million. CVSB, as pointed out earlier, was only a RM2 company. The reserve price of the property at the scheduled third auction was RM45 million based on the valuation report prepared by the first respondent's valuer, namely, Messrs Stocker Roberts & Gupta. The amount owing by the defendant/first respondent is RM44.8 million as at 20 September 2004. It simply does not make any sense at all for the first respondent to hastily execute a sale and purchase agreement for RM32 million and undertake to pay the difference of RM13 million to the plaintiff in the light of the impending third auction.

[43] The defendant/first respondent itself is acutely insolvent with an admitted debt of RM115 million as at 30 September 2003 and is even unable to pay interest of RM212,065.46 ordered against them when they obtained a conditional stay of the first auction. A

[44] Neither the first respondent nor CVSB has any capability of completing the sale transaction. The sale and purchase agreement with CVSB is, to my mind, nothing but a complete sham. B

Further *Mala fide*

[45] At the hearing of encl. 51 before the senior assistant registrar on 7 December 2004, of the plaintiff's application to fix the fourth auction date, counsel for the defendant/first respondent opposed the application and urged the Court to dismiss the plaintiff's application in the light of CVSB's caveat. But only on that day itself (7 December 2004), and just before the hearing, did CVSB file an application to intervene in the foreclosure proceeding. It is, therefore, pertinent to ask: why must this application to intervene be made on that very day itself when the sale and purchase agreement was executed long way back on 16 September 2004? Clearly this application is *mala fide*. C D E

[46] Meanwhile, in another court, that is to say, in the court No. 1 of the Civil Division, in case No. S1-24-2462-2004, an application was made by the plaintiff by way of an originating summons to have the caveat lodged by CVSB removed. The application was heard on 6 December 2004. Counsel for the first respondent who appeared in court for the hearing informed the court that the first respondent intended to intervene and to oppose the removal of the caveat. However, on 28 February 2005, the Civil No. 1 Court ordered the removal of CVSB's caveat. There has, however, been no appeal against this decision. F G

The First Restraining Order

[47] It is my finding that the s. 176(10) of the Companies Act restraining order obtained by the defendant/respondent on 22 December 2003 (that is, the first restraining order) is an abuse of process. The plaintiff is the sole secured creditor of the first respondent and was classified as a creditor in its own class (Secured F1 Creditor) by Messrs Ernst & Young in their Concept Paper. The defendant/first respondent knew that the plaintiff opposed the scheme and that without the support of the plaintiff the scheme was doomed to fail. H I

[48] The second to fifth respondents knew of the second auction date (26 December 2003) as early as 14 November 2003. Notice was also given by the plaintiff's solicitors to the first respondent's solicitors that the plaintiff wished to be served with any intended s. 176 application. Yet, in spite of the notice, and knowing that the plaintiff's vote in the proposed scheme was decisive, the first respondent proceeded with their application *ex parte*. The only and irresistible conclusion, therefore, is that the real objective of the s. 176 proceeding was to stop the second auction scheduled to be held on 26 December 2003.

[49] Then, tellingly, there is the timing of the filing of the s. 176 application (in the Commercial Division Court *via* case No. D7-24-341-2003). It was filed on 19 December 2003. This was just seven days before the second auction date (26 December 2003). The affidavit in support of the application was affirmed by Vinod Kishu Tirathrai, the fourth respondent. The application was filed by Messrs Choong & Co.

[50] The plaintiff's solicitors were only notified at 6.24pm on 22 December 2003 that the first restraining order had been obtained *ex parte*. The plaintiff's solicitors' request for the full intitlement of the cause papers and a set of the cause papers was initially refused by the first respondent's solicitors in spite of the fact that the first restraining order was obtained on an urgent basis to stop the second auction and had directly and adversely affected the plaintiff. The plaintiff's solicitors were informed that their request for the cause papers should be made in writing and was subject to the first respondent's instruction. They were, however, subsequently furnished - but only on 24 December 2003, on Christmas Eve. But by then, due to the lateness, the plaintiff had no opportunity to approach the court to set aside the *ex parte* order before 26 December 2003, the date of the second auction.

[51] However, on 18 March 2004 the High Court set aside the first restraining order. I accept the plaintiff's contention that the s. 176 proceeding was instituted in bad faith: it was commenced solely with the intention of preventing the second auction being held in the light of the first respondent's unsuccessful application for a stay of the auction.

Attempt By Certain Creditors To Injunct The Second Auction

[52] On 18 December 2003, that is to say, just six days before the second auction date, certain creditors of the first respondent filed an originating summons in the High Court (Civil Division) of Kuala Lumpur *via* case No. S2-24-2449-2003 seeking an injunction to stop the carrying out of the second auction pending the implementation of a proposed restructuring exercise to be submitted by the first respondent.

[53] This originating summons was, however, subsequently withdrawn after the second auction was vacated by reason of the first restraining order.

[54] Counsel appearing for the creditors in the originating summons application was one Ms Ayenita Sood from Messrs Choong & Co. Now, it is pertinent to recall that Messrs Choong and Co. was the first respondent's solicitors in the first restraining order application. It is also to be recalled that Ms Ayenita Sood (together with one Mr. Sreedharan) was also the counsel for the defendant/first respondent in that application.

[55] I accept the submission by the learned counsel for the plaintiff, Encik Benjamin Dawson, that, the fact that the counsel for the certain creditors (Ms Ayenita Sood) and counsel for the caveators (Mr. G. Sreedharan) were from the same firm of solicitors (Messrs Choong & Co) who were also the solicitors for the first respondent in the first restraining order application, reveals the existence of a pre-meditated scheme by the second to fifth respondents to frustrate the order for sale.

[56] The second to fifth respondents, however, contend that the legal representation by Messrs Choong and Co as counsel for the certain creditors in the originating summons was a mere coincidence. The plaintiff, however, on the other hand, points out that the solicitors on record in the originating summons for these creditors was Messrs Ravi Beltran and Co and it should be recalled that Messrs Ravi Beltran and Co was acting for the caveators, who are companies that are connected and associated with the first respondent.

[57] The plaintiff contends (and, correctly, in my view) that the same factual pattern is repeated here. Messrs Ravi Beltran & Co is the solicitors on record in the creditors originating summons and Messrs Choong and Co was appointed as counsel for the purpose of the hearing of the originating summons. The argument that the whole arrangement was a mere coincidence must be rejected.

[58] To my mind, all this was not a mere coincidence but rather a manifestation of a design premeditated by the second to fifth respondents and calculated to frustrate the second auction.

The Second Restraining Order

[59] Then there were the circumstances under which the second restraining order was obtained by the defendant/first respondent. The third auction of the property was scheduled to be carried out on Monday 20 September 2004. And certain unsecured trade creditors of the defendant/first respondent commenced proceeding under s. 176 of the Companies Act *via* case No. D6-24-271-2004 and obtained the restraining order from the Commercial Division of the Kuala Lumpur High Court. However, one notes – and this is very significant - that this second s. 176 application was filed only on 17 September 2004, that is to say, just three days before the third auction date; and the second restraining order was obtained on the same day. This very short period of just three days gave the plaintiff no opportunity to apply to the court to set aside the second restraining order. This was the same *modus operandi* adopted when the first restraining order was obtained.

[60] This second restraining order was obtained by the unsecured trade creditors in reliance on the sale and purchase agreement between the defendant/first respondent and CVSB.

[61] The unsecured trade creditors were represented by Messrs Choong & Co. It is to be recalled that they were also the solicitors for the first respondent in the first restraining order application.

[62] Just like the application for the first restraining order, this second restraining order was also obtained on an *ex parte* basis.

[63] The proposed scheme of the unsecured trade creditors involves only the unsecured trade creditors of the defendant/first respondent. Yet this second restraining order was obtained against the plaintiff who is a secured creditor. There was absolutely no basis whatsoever for the second restraining order to be extended against the plaintiff.

[64] In obtaining this *ex parte* second restraining order so as to stop the third auction, the unsecured trade creditors proceeded on the footing that the plaintiff would suffer no prejudice because it would receive full payment under the sale and purchase agreement between the first respondent and CVSB. Now, the unsecured trade creditors knew or ought to have known that CVSB was a mere RM2 company and that the first respondent was acutely insolvent. Therefore, the unsecured trade creditors knew or ought to have known that the sale and purchase transaction was incapable of performance. No rational or reasonable creditor would have acted in the way that the unsecured trade creditors had acted.

[65] Under the unsecured trade creditors' proposed scheme (prepared by Messrs K. Ramanathan & Co), the unsecured trade creditors would take over the business of the first respondent. Now, no reasonable creditor would take over the business of its debtor who has a debt of RM115 million and is unable to pay the debt owing to its creditors. It does not make sense at all to do so.

[66] Under the unsecured trade creditors' proposed scheme, there would be a close collaboration between the unsecured trade creditors and the defendant/first respondent. The unsecured trade creditors and the members of the defendant/first respondent would form an entity called Konsortium Globe Silk Store Sdn Bhd.

[67] The second to fifth respondents now acknowledge that CVSB is a friendly party to the first respondent. CVSB is also connected to and involved in the unsecured trade creditors' proposed scheme.

[68] Just like the defendant/first respondent in the first restraining order application, the unsecured trade creditors too had engaged Messrs Choong & Co as their solicitors in this second s. 176 proceeding. The deponent of the affidavit in support of the second

s. 176 application was one Mr. Ramesh Konammal. It is important to note that this is the very same person who had earlier affirmed the affidavit in support of the attempted injunction as just narrated above.

[69] I have stated earlier that it could not have been a mere coincidence that the certain creditors had engaged Messrs Choong & Co, the solicitors for the first respondent, to act for them when applying for the injunction via originating summons No. S2-24 - 2449-2003. It is likewise here. It is my finding that that the second to fifth respondents cannot be said to be not directly connected in the events leading to the second restraining order being applied for, to prevent the third auction from taking place. It is reasonable to infer that they must have been directly involved.

[70] On 11 March 2005, the High Court, rightly, set aside the second restraining order. But the damage to the plaintiff's interest had already been done. For, the third auction, scheduled for 20 September 2004, had to be aborted by reason of this second restraining order.

[71] It is fair and reasonable to infer that the unsecured trade creditors, the respondents and Messrs Choong & Co were all aware that there was no basis whatsoever to have applied for the *ex parte* restraining order against the plaintiff. Clearly the motive was nothing more but merely to frustrate the third auction that was due to be held.

The Culpability Of The Second To Fifth Respondents

[72] The second to fifth respondents are the human agencies responsible for the conduct of the affairs of the companies named. They are the directing mind and will of the company. They are the real actors in the conduct of the company's affairs. The company is not a real person. The directors sit on the driver seat of the company – the vehicle. The second to fifth respondents are therefore fixed with liability for the conduct of the company and are liable to process of execution. In *Datuk Hong Kim Sui v. Tiu Shi Kian & Anor* [1987] 1 CLJ 438; [1987] CLJ (Rep) 1 the Privy Council held as follows:

> Thus the Rules recognize that directors and officers are the human agencies responsible for the conduct of the affairs of companies. They fix a director with liability for the conduct of the company and so with liability for any breach by the company of an injunction where the director has appropriate notice that he is liable to process of execution if the company disobeys the Order.

(Please see also *Datuk Hong Kim Sui v. Tiu Shi Kian & Anor & Another Case* [1985] 1 CLJ 39; [1985] CLJ (Rep) 101 FC, *Jasa Keramat Sdn Bhd v. Monatech* [2001] 4 CLJ 549 and *William Jacks & Co. v. Chemquip* [1994] 3 CLJ 125).

[73] In the present case, in spite of the serious allegations of the plaintiff, the second to fifth respondents have not denied that they had full knowledge and have participated in the actions adverted to above.

The Alleged Resignation Of The Fourth And Fifth Respondents

[74] In para. 7 of encl. 73, the second respondent states that both the fourth and fifth respondents have resigned from their position as directors of the first respondent on 30 June 2004.

[75] The aforesaid assertion contradicts the affidavit of the fourth respondent himself. In his affidavit affirmed on 3 August 2004 (see encl. 66, exh. 40) the fourth respondent (Vinod Kishu Tirathrai) has averred that as at 3 August 2004 he was a director of the first respondent. The second respondent himself had, in his affidavit affirmed on 6 December 2004 in the present originating summons proceeding (for the purpose of convenience this affidavit is exhibited in the affidavit at encl. 60 as exh. HSBC-12), referred to the affidavit of the fourth respondent affirmed on 3 August 2004. The second respondent did not in this affidavit say that the fourth respondent was not a director of the first respondent when the latter was affirming the affidavit in exh. HSBC-40 of encl. 66. There is also no explanation whatsoever in the second respondent's affidavit at encl. 73 for this contradiction.

[76] It cannot be possible that in affirming the aforesaid affidavits the second and fourth respondents were unaware that as at 30 June 2004, the fourth respondent was not a director of the first respondent. It is plain therefore that the second respondent is not telling the truth about the issue of the resignation (if any) of the fourth and fifth respondents. This is a most serious matter, particularly when made in the course of a committal proceeding.

[77] It is to be noted that the second respondent refers to a Form 49 that bears the date 10 September 2004 (a date that is three months after the date of the alleged resignation) and which is exhibited as exh. TSK-2 of encl. 73, as evidencing the resignation of the fourth and fifth respondents. However, it is pertinent to observe that the second respondent does not state that Form 49 has been lodged with the Companies Commission of Malaysia.

[78] Encl. 73 is lacking in candour and material information. As correctly submitted by the learned counsel for the plaintiff, the resignation of the directorship of the fourth and fifth respondents (if any) does not take effect until the amended Form 49 is lodged with the Registrar of Companies (see s. 141(8) of the Companies Act 1965). Third parties would not be aware of the changes in the officers of a company unless the Form 49 has been filed.

[79] Indeed, in the concept paper dated 12 October 2004 prepared by the unsecured trade creditors, which is part of the applicants' documents in the second s. 176 application, the fourth and fifth respondents are included on the board of directors of the first respondent. It will be seen that the first respondent's solicitors in the first s. 176 proceeding, Messrs Choong & Co, are also the solicitors in the second s. 176 proceeding and had relied on the aforesaid concept paper.

[80] In circumstances the allegation of the second respondent of the resignation of the fourth and fifth respondents contradicts the contemporaneous documents and must be rejected.

[81] Having evaluated the evidence as a whole, I respectfully accept the submission of Mr. Benjamin Dawson that the evidence of the second to the fifth respondents in encl. 73 is evasive, inconsistent and improbable.

[82] It is, therefore, imperative that committal orders be issued against the second, third, fourth and fifth respondent.

[83] Interference with the administration of justice covers any act that impedes the ability of our courts to do and deliver justice. Likewise, obstructing the course of justice covers any act that is obstructive to the course of justice. As at 26 January 2005, the order for sale issued on 20 March 2003 has yet to be given effect

to. As at that date three scheduled public auctions have not been able to be carried out, and there is a caveat in the way of the scheduled fourth auction. The respondents have stultified the foreclosure proceeding without the first respondent having to repay its indebtedness. Abuse of process is punishable with contempt of court (see *Affin Bank Berhad v. Tan Sri Kishu Tirathrai* [2004] 7 CLJ 145).

[84] With respect, I accept without any reservation whatsoever Mr. Benjamin Dawson's submission that the machinations of the respondents in the present case are so serious, so gross and too flagrant to be ignored. The temerity of the respondents to do what they did demonstrates not only their utter disregard and lack of respect for the authority, dignity and integrity of the court and the administration of justice, but an overt manipulation and undermining of the legal process without any compunction whatsoever resulting in the court process being used as a tool of oppression and injustice.

[85] I am in agreement with learned counsel that the conduct of the respondents in this case is rather exceptional. They are far worse than a mere disobedience of an order. Here there exists a concerted and premeditated plan, and a sustained and manipulative effort to set the order for sale to naught. The fact pattern reveals a startling abuse of court process.

[86] These abuses by the second to fifth respondents have scandalized the court and they must be purged and sanctioned. This is imperative for the proper functioning of the administration of justice.

On Sentence

[87] The court will always look upon very seriously against any act that defies its order. This is because obedience to the order of the court is the very foundation of our judicial and legal system. If any member of the public is 'at liberty' to disobey a court's order, then the judicial and legal system will collapse; and so will law and order. But the present case has a special aggravating element and that is the manner the act of disobedience was done by the respondents. It has an element of subtlety and cunningness. By engaging lawyers and other professionals and invoking the legal process, the acts have an outward appearance

of professionalism, sophistication and legality. Such a *modus operandi* often makes the victim and, indeed, the judicial and legal system itself, helpless. Because of the subtle method employed and the ruthless utilization of the court process, it is often an uphill task for the aggrieved party to convince a court of law that, behind the façade of 'legality' employed by his adversary, he is in fact being victimized or being mercilessly and unjustly deprived the fruits of his litigation; unless the victim is a person of means (like the plaintiff in the present case, being a bank with financial resources at its disposal) and able to employ an able prosecutor.

[88] Bearing the above in mind (and having taken into account the plea in mitigation) I was of the view that a custodial sentence was warranted. Hence, I sentenced each of the four respondents to three months' imprisonment.

[Each of the four respondents (ie, the second to the fifth respondents) found guilty of contempt and each sentenced to three months' imprisonment.]